

By requiring the short-form pre-auction application to include a financial certification (Second R&O at 64), the Commission adopted rules inconsistent with AIDE's proposal, but without responding to the specifics of AIDE's proposal. Upon reconsideration, the Commission should revisit the issue, and adopt AIDE's proposal.

VII. THE COMMISSION SIDESTEPED AIDE'S ARGUMENT THAT VAGUE REFERENCES TO PROPOSED PCS APPLICATION-PROCESSING RULES ARE LEGALLY INSUFFICIENT FOR A NOTICE OF PROPOSED RULE MAKING.

Although this rulemaking is limited to implementation of the competitive bidding requirements of Section 309(j) of the Communications Act (NPRM, ¶¶1-10), in a brief reference (NPRM, ¶128) the Commission proposed substantive PCS application-processing rules:

In order to avoid needless duplication, we propose that the following general filing and processing rules apply to all PCS: Sections 22.3-22.45 and 22.917(f), and 22.918-22.945, 47 C.F.R. §§ 22.3-22.45, 22.917(f), and 22.918-22.945. For those PCS applicants who file on

^{28/}(...continued)

showing of financial qualifications as part of its initial application. If the application became mutually exclusive and subject to competitive bidding, the applicant's payment of its winning bid would unequivocally demonstrate that it was financially qualified. In AIDE's experience, the selling price of most Commission-licensed systems (cellular, SMR, PCP, common-carrier paging) far exceeds the purchase price of the tangible assets. Thus, if a Designated Entity can pay the auction bid, it can be presumed to be able to pay its initial construction and operating costs.

On the other hand, if the application did not become mutually exclusive (by virtue of a full settlement or an uncontested filing), then the applicant should have a short period, say 30 days, from the date of Public Notice (Second R&O at 64-65) in which to file any required demonstration of financial qualifications by amendment.

Form 574, we believe that Sections 90.113-90.159 of our rules, 47 C.F.R. §§ 90.113-159, could be used to process those applications with appropriate modifications.

This rulemaking topic is improper, being not within the scope of the NPRM.

Accordingly, AIDE's Comments (at 16-18) argued that this proposal is legally insufficient to constitute a valid notice of proposed rules.^{29/} Indeed, the cited Part 22 and Part 90 Rules have no immediate applicability to PCS service, being limited to other radio services and frequency bands. Moreover, the substance of PCS regulation differs dramatically from PLMS, DPCRTS, and PLMRS regulation.^{30/} Thus, many of the cited rule sections are either irrelevant to PCS operation, obsolete,^{31/} or inconsistent with the adopted PCS Rules. Given the one-sentence

^{29/} Section 1.413(c) of the Commission's Rules requires that every Notice of Proposed Rule Making include "Either the terms or substance of the proposed rule or a description of the subjects and issues involved." The NPRM's PCS "proposal," such as it is, is insufficient under this standard.

Clearly, the NPRM does not state "the terms ... of the proposed rule or a description of the subjects and issues involved." The NPRM contains no proposed rules and no description of the "subjects and issues." Similarly, the NPRM does not provide sufficient notice of the "substance" of the proposed PCS rules. The "appropriate modifications" which the Commission recognized are necessary are not specified.

^{30/} The three existing services license transmitters on a site-by-site basis; the PCS regulations prohibit site-by-site licensing. See Section 99.11(b) of the Commission's Rules. PCS has a ten-year license term with renewal expectancy; PLMRS, a five-year term without renewal expectancy. DPCRTS requires detailed coverage maps; PCS apparently does not. PLMS and DPCRTS both require detailed engineering calculations as part of the application; PCS does not.

^{31/} The cited Sections 22.944 and 22.945 have been deleted from the Commission's Rules.

description of the PCS proposal in the NPRM, it is impossible (absent an amazing act of regulatory mind-reading) to discern what the Commission proposes for PCS regulation.

The Commission failed to respond to the merits of AIDE's arguments. Instead, the Second R&O responded to AIDE's arguments as follows:

[AIDE] argues ... that we have not afforded sufficient notice in the NPRM to permit us to promulgate rules for the auction of PCS. We disagree. The NPRM was sufficiently specific to draw numerous and extensive comments from interested parties on the proposed procedures. See, e.g., NPRM at ¶¶ 120-130, 167-175. The Commission proposed to base its PCS application filing and processing rules on existing rules used for the processing of other mobile radio services, such as the cellular radio service and the private land mobile radio services, and proposed the use of a one-day filing window for PCS applications. We made reference to specific rules in the cellular service and in the private land mobile radio service. We proposed use of both a short-form and a long-form application to speed processing, and asked when we should consider petitions to deny. We further asked when we should use combinatorial bidding, proposed to auction the biggest markets first... and proposed a specific upfront payment in dollars for nationwide narrowband PCS. We proposed that no modifications be allowed until after a winning bidder emerged, and proposed which forms applicants should use to apply for PCS licenses. Finally, we proposed the application fees we proposed to charge and advanced numerous other proposals as well. We received voluminous comments from many parties on these issues. In view of the extensive and detailed comments we received on all aspects of our proposal, we disagree with AIDE's conclusion....^{32/}

The quoted language -- which is the Commission's only response to AIDE on this matter -- reveals the flaws in the Commission's analysis.

First, AIDE did not assert (as the Commission erroneously claims) that the NPRM failed to provide sufficient notice of its

^{32/} Second R&O, at 63 n. 119 (emphases added).

proposed rules "for the auction of PCS." AIDE's claim was carefully limited to the insufficiency of the Commission's notice for what the NPRM characterized (in ¶128) as substantive "filing and processing rules" for PCS applications once the auction was held. These are two separate topics, and require separate proposals.

Second, the specific paragraphs of the NPRM cited by the Commission discuss such topics as combinatorial bidding (¶¶120, 123), preferences for Designated Entities (¶¶121-22), PCS spectrum aggregation (¶124), auction order (¶125), pre-auction PCS upfront payments (¶126), PCS performance requirements (¶127), PCS application forms (¶¶128-29), need for PCS auctions (¶130), and auction procedures (¶¶167-75). These topics are virtually unrelated to the important topics addressed in the existing rules which the Commission "proposed" for PCS "with appropriate changes."^{33/}

^{33/} As an example, the cited rule sections cover such topics as applicant eligibility (Sections 22.4 and 90.115), filing of applications (Sections 22.6, 22.9, 22.11, 90.117, 90.119, and 90.135), substantive application content requirements (Sections 22.13, 90.123-90.129, and 90.147), technical content of applications (Section 22.15), objective need standards (Section 22.16), rule waivers (Sections 22.19 and 90.151), defective applications (Sections 22.20-22.22), amendment of applications (Sections 22.23, 22.918, and 90.131), temporary authorizations (Sections 22.25, 90.137, and 90.145), application processing procedures (Sections 22.26-22.28 and 90.139-90.143), ownership changes and settlement procedures (Section 22.29), opposition to applications (Section 22.30), mutually exclusive applications (Section 22.31), application processing standards and procedures (Section 22.32), lottery and comparative-hearing procedures (Sections 22.33 and 22.35), transfer and assignment procedures and standards (Sections 22.39, 22.40, 22.920, and 90.153), construction period (Sections 22.43 and 90.155), termination of authorization (Sec-
(continued...)

Third, the Commission mischaracterizes the record which it asserts that "extensive and detailed comments" were received on its application-filing and -processing rules. Only one (1) party out of two-hundred-twenty-two (22) commenting parties -- MCI -- commented on the Commission's "proposed" PCS procedural rules, and MCI's discussion on this topic was limited to slightly over one (1) typed page.^{34/} This paucity of comment should be compared with the detailed proposals, extensive comments, and exhaustive discussions of those comments in other recently proposed and final land-mobile rules.^{35/} Each of those proceed-

^{33/} (...continued)
tions 22.44 and 90.157), license period (Sections 22.45 and 90.149), unserved-area cellular financial requirements (Section 22.917(f)), application-ownership restrictions (Section 22.921), pre-grant ownership transfers (Section 22.922), content of RSA and unserved-area cellular applications (Sections 22.923 and 22.924), cellular system information update procedures (Sections 22.925 and 22.926), limitations of cellular settlements (Sections 22.927-22.929), alternative cellular technologies (Section 22.930), cellular-license renewal standards and procedures (Sections 22.940-22.943). Sections 22.944 and 22.945, upon which the Commission intends to rely, have been deleted from the Rules.

^{34/} See Comments of MCI Telecommunications Corporation at 18-19.

^{35/} See, e.g., Personal Communications Services, 8 FCC Rcd 7700 (1993) (GEN Dkt. No. 90-314) (73 parties produced 61-page decision); NPRM, supra (63-page proposal for auction rules); Regulatory Treatment of Mobile Services, 8 FCC Rcd 7988 (1993) (Notice of Proposed Rulemaking) (GN Dkt. No. 93-252) (32-page proposal); Replacement of Part 90, 7 FCC Rcd 8105 (1992) (Notice of Proposed Rulemaking) (PR Dkt. No. 92-235) (419-page proposal); Personal Communications Services, 7 FCC Rcd 5676 (1992) (Notice of Proposed Rulemaking) (GEN Dkt. No. 90-314) (97-page proposal); Revision of Part 22, 7 FCC Rcd 3658 (1992) (Notice of Proposed Rulemaking) (CC Dkt. No. 92-115) (98-page proposal); Cellular Unserved Areas, 6 FCC Rcd 6185 (1991) (First Report and Order and Memorandum Opinion and Order on Reconsideration) (CC Dkt. No. 90-6) (35 commenting parties produced an 87-page decision); 220-222
(continued...)

ings illustrates the amount of notice required for the proposal and adoption of PCS procedural rules. In other words, the Commission's failure to give adequate notice of its intentions for PCS procedural rules yielded a silent record here.

In summary, the Commission needs to issue a supplemental Notice of Proposed Rule Making in the PCS proceeding to adopt the substantive PCS rules vaguely alluded to in the competitive bidding NPRM.

CONCLUSION

Accordingly, the Association of Independent Designated Entities respectfully requests that the Commission reconsider the Second Report and Order as set forth herein.

Respectfully Submitted,

ASSOCIATION OF INDEPENDENT
DESIGNATED ENTITIES

By: William J. Franklin
William J. Franklin
Its Attorney

WILLIAM J. FRANKLIN, CHARTERED
1919 Pennsylvania Avenue, N.W.
Suite 300
Washington, D.C. 20006-3404
(202) 736-2233
(202) 452-8757 (Telecopier)

^{25/} (...continued)

MHz Band, 6 FCC Rcd 2356 (1991) (Report and Order) (PR Dkt. No. 89-522) (69 commenting parties produced a 35-page decision); Revision of Part 22, 95 FCC 2d 769 (1983) (Report and Order) (CC Dkt. No. 80-57) (23 commenting parties produced a 196-page decision).

DECLARATION OF DAVID MEREDITH
UNDER PENALTY OF PERJURY

I, David Meredith, do hereby state and depose as follows:

1. I am a member of the Association of Independent Designated Entities ("AIDE"). AIDE is an unincorporated association, with membership limited to persons and entities likely to be classified as "Designated Entities" under Section 309(j) of the Communications Act. AIDE was formed for the purpose of representing the interests of designated entities before the Commission.
2. Various AIDE members have extensive legal, technical, financial, and communications backgrounds. Many have owned or managed small businesses, and understand the special needs and problems of small and start-up businesses. The women and minority AIDE members also know the unique burdens which they bear.
3. I am self-employed, and hold numerous communications interests in Specialized Mobile Radio systems, both in my own name and as a part owner of various Commission licensees. I believe that I and my communications companies qualify as a small-business "Designated Entities" under Section 309(j) and the Commission's Rules.
4. By myself or with others, I intend to participate in the Commission's auction process for narrowband and broadband PCS, and possibly other services as well. My decision to apply for any specific license will depend on a number of factors, including what licenses are available, the applicable Commission rules for their assignment, and the economic environment in which the licensed service will operate.
5. I wish to have AIDE represent my interests before the Commission in assuring that the auction rules are consistent with the interests of designated entities and otherwise serve the public interest. I believe that my interests are consistent with those of other AIDE members, and that they also wish AIDE to represent their interests. For that reason, AIDE is seeking reconsideration of the Commission's Second Report and Order in the auction proceeding (PP Docket No. 93-253).

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 2nd, 1994.


David Meredith